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***154 RESOLVING STATE-TRIBAL JURISDICTIONAL DILEMMAS**

Stanley G. Feldman [\[FNa\]](#) and David L. Withey [\[FNb\]](#)

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As a project of the Conference of Chief Justices is demonstrating, it is possible through communication and cooperation to minimize jurisdictional problems between state and tribal courts.

All states have both Indian and non-Indian citizens. Even states with no federally recognized Indian lands have citizens with ties to Indian country that may become a factor in matters before the courts. In states that do contain Indian country, some Indian citizens live outside and some non-Indian citizens live within Indian country. The business and social affairs and problems of many people, citizens and visitors, Indians and non-Indians thus traverse the political/legal boundaries of Indian country every day.

Independent, functioning tribal governments exercising jurisdiction over land and people are a growing reality. Although these governments are sovereign in somewhat the same manner that states are sovereign, they are much more subject to the supremacy of the federal government. Tribal governments, according to one ruling, are most "analogous to the territories of the United States, which are also subject to Congress' plenary power." [\[FN1\]](#) Yet, as Chief Justice John Marshall noted, tribal governments are most accurately described as domestic dependent nations that have retained inherent sovereignty. [\[FN2\]](#) Indeed many state-tribal jurisdictional problems are comparable to issues between states or nations. Consider these examples:

- A suspect flees across the border with law enforcement officers in hot pursuit.
- Law enforcement officers are unable to arrest a husband who has violated a protective order issued in a different jurisdiction.
- Resolution of an important contract dispute is delayed while the parties litigate which jurisdiction should resolve the substantive dispute.
- A key witness refuses to travel to the jurisdiction in which a case is to be tried.
- Children live in poverty in one jurisdiction despite a court order requiring payment of substantial child support by a noncustodial parent living in another jurisdiction.

These types of jurisdictional problems arise not only between states but also in disputes between state and tribal jurisdictions. In the latter situation, the issues are even more problematic because tribal jurisdiction is based on the identity of the parties involved in addition to both the matter at issue and the territory in which an event occurs. Consider these additional examples:

- A non-Indian father is not prosecuted for misdemeanor abuse of his Indian child on an Indian reservation because the tribe lacks jurisdiction to prosecute non-Indians, the state lacks jurisdiction to prosecute offenses involving Indians and committed in Indian country, and the U.S. attorney lacks resources to prosecute misdemeanors.
- Tribal police decline to enforce a state domestic violence protective order recognized by the tribal court because they have no authority to arrest a non-Indian spouse for violating the order.
- An Indian is prosecuted by federal authorities for an offense lesser than homicide due to the difficulty of proving the necessary intent. A tribal prosecutor believes she can prove the necessary intent, but the tribal court cannot

impose a sentence of more than six months in jail for any offense.

-- A non-Indian spouse receives a default divorce and child custody decree in state court about the same time as the Indian spouse receives a similar decree in tribal court.

-- An Indian living in Indian country requires inpatient mental health care but cannot be involuntarily committed by a state court due to its lack of jurisdiction. A tribal court commitment is insufficient because the state hospital is authorized to receive commitments only from state courts.

These and similar occurrences are certainly fairly common and illustrate the problems inherent in limitations of tribal jurisdiction. Another hypothetical provides even more food for thought: Bonnie, an Indian, and Clyde, a non-Indian who resides with Bonnie in Indian country, rob the tribal casino, receive a speeding ticket in Phoenix, rob a convenience store in California, and trespass on the beach in Mexico. They could both be fully prosecuted by all jurisdictions in which they committed their offenses except ***155** the Indian tribal jurisdiction where they reside and where they committed the most serious crime. The tribe could only prosecute Bonnie for a misdemeanor and could not prosecute Clyde at all.

Responding to the dilemma

In 1988 the Conference of Chief Justices became sufficiently concerned about the jurisdictional dilemmas arising in the interaction of state and Indian tribal jurisdiction to appoint a committee to seek ways to resolve these problems. The Civil Jurisdiction in Indian Country Project began in 1989 with a mail and telephone survey of the approximately 150 tribal courts across the country and many of the state officials with whom they interact. [\[FN3\]](#) Results of the survey identified several types of disputed civil cases, particularly those involving the Indian Child Welfare Act, domestic relations, contract, taxation, and hunting and fishing activities. They revealed a wide variety of means to resolve jurisdictional issues but little consistency from state to state or even within states.

The project moved forward in 1990 under the direction of a coordinating council composed of state, tribal, and federal court members and several Indian law experts. Council members meeting in Arizona, Oklahoma, and Washington sought solutions by discussing innovative approaches to resolving state and tribal civil jurisdiction issues.

In the summer of 1992 the three forum states reported their results at a national conference that included participants from 22 states. The participants from each of these states in turn developed their own action plans.

In the fall of 1993, the Conference of Chief Justices' Coordinating Council and the National Center for State Courts invited leaders of state, tribal, and federal courts and prominent experts in Indian law to a national leadership conference to develop a national agenda addressing civil and criminal jurisdictional problems encountered by tribal, state, and federal courts. The agenda is available from the National Center for State Courts.

The Conference of Chief Justices has since recognized additional work is needed to implement the national agenda, particularly regarding state, tribal, and federal criminal jurisdiction in Indian country. In 1994, it formed a standing committee on federal, state, and tribal relations, and in 1995 it authorized the National Center for State Courts to seek funding for a new project to address these issues. [\[FN4\]](#)

Avenues of cooperation

Communication, cooperation, and comity became the themes of the project. The essential premise of all activities and future cooperative efforts is mutual respect. Differences and shortcomings are acknowledged, and ways of cooperating without characterizing either state or tribal courts as better or worse, more or less sophisticated, are being sought. Mutual respect is enhanced by acknowledging the strengths and weaknesses of the different systems, by recognizing what each has in common, and, most important, by learning from each other.

Tribal courts are often staffed by non-lawyer judges proceeding informally with the parties representing themselves

not unlike state justice of the peace and small claims courts. State courts of general jurisdiction, on the other hand, are structured to resolve more complex disputes through a formal adversary process, with lawyers representing the parties and lawyer judges presiding over the proceedings. Both systems offer advantages and disadvantages.

In fact, state and tribal courts have much to learn from each other's traditions and more in common than is readily apparent. Tom Tso, former Navajo Nation chief justice, noted traditional strengths of the Navajo justice system that are based on concepts just coming into vogue in state court systems:

Anglo judicial systems now pay a great deal of attention to alternative forms of dispute resolution. Before 1868 the Navajo settled disputes by mediation. Today our Peacemaker Courts, which integrated traditional Navajo dispute resolution methods with Anglo-American judicial methods, are studied by many people and governments. Anglo justice systems are now interested in compensating victims of crime and searching for ways to deal with criminal offenders other than imprisonment. [\[FN5\]](#)

Another example of similarities among state and tribal court systems is juvenile justice reform, now under consideration in many states. Neighborhood restorative justice centers are cited as a promising new alternative for dealing with minor juvenile crime. Chief Justice Tso also described a traditional Navajo way of handling offenders that sounds remarkably familiar:

What holds us together is a strong set of values and customs, not words on paper. I am speaking of a sense of community so strong that, before the federal government imposed its system on us, we had no need to lock up wrongdoers. If a person injured another or disrupted the peace of the community, he was talked to, and often ceremonies were performed to restore him to harmony with his world. There were usually no repeat offenders. Only those who have been subjected to a Navajo "talking" session can understand why this worked. [\[FN6\]](#)

Comity and cooperation

By giving deference to each other's judgments and orders without any legal requirement to do so, state and tribal courts demonstrate respect for each other's differing processes and jurisdiction. Judgments of other jurisdictions are recognized under the principle of comity unless a fundamental public policy reason is shown for not recognizing a judgment. Forum states identified the following options to help state and tribal courts assist litigants in overcoming jurisdictional barriers by recognizing each other's judgments and orders:

- Adopt a court rule providing for recognition of tribal court judgments by state courts on a mandatory (full faith and credit) or discretionary (comity) basis.
- Adopt a uniform statute providing for reciprocal recognition of certain tribal court judgments.
- Adopt statutes and rules providing for recognition of certain kinds of orders, such as state court recognition of tribal court involuntary commitment orders.
- *156 Amend existing uniform acts, such as the Uniform Child Custody Jurisdiction Act and the Uniform Parental Kidnapping Act, to include Indian tribes as potential participants.

A basic premise underlying the theme of cooperation is the common interest shared by state and tribal courts and the people they serve. State and tribal courts serve everyone in the jurisdictions in which they operate, even though people traveling or doing business over jurisdictional borders do not always recognize the legal significance of those borders until they become involved in a crime or dispute.

Whether they live within or outside Indian country, both Indian and non- Indian citizens of each state are harmed when civil judgments or criminal law cannot be effectively enforced. Effective enforcement of civil judgments is needed to create an orderly environment for commerce and to hold accountable people who undertake a legal responsibility such as parenting a child or assuming contractual obligations. On the other side of the ledger, effective law enforcement is needed to protect everyone in a state and to bring to justice those who commit crimes anywhere in a state. For a state's criminal justice system to be effective, tribal law enforcement authorities and judicial

institutions must be full participants. As Chief Justice Tso explained, effective law enforcement requires community participation.

Forum states identified a variety of methods for promoting cooperation between state and tribal courts:

- Promote congressional legislation that recognizes and authorizes appropriate tribal jurisdiction over conduct of people within Indian country, regardless of identity or residency.
- Promote congressional funding of tribal courts and law enforcement sufficient to enable their full partnership with state justice systems.
- Help tribal courts justify their importance and resource needs to tribal governments.
- Make intergovernmental agreements that provide for cross-utilization of facilities, programs, and personnel by state and tribal court systems such as cross-appointment of judges and judicial staff, such as probation officers.
- Promote state legislation, as needed, authorizing criminal extradition to and from Indian country and sharing conviction information for the purpose of license suspensions and enhancement of sentences.

The theme of cooperation is also premised on the understanding that personal contact between state and tribal judges is the most effective means of resolving jurisdictional issues. A close second is a practicing bar that is fully informed about tribal court locations, procedures, and jurisdiction, with access to tribal law. Lawyers who understand jurisdictional problems can often avoid them by carefully advising a client or filing a case in the appropriate court. State and tribal judges can often resolve jurisdictional problems by talking to each other.

Forum states recommended the following methods to promote resolution of jurisdictional issues through cooperation and communication:

- Hold joint educational conferences for judges, court clerks, probation officers, and other court staff.
- Form Indian law sections of state bar associations to promote education of state bar members and to provide information about tribal courts.
- Prepare a tribal court handbook with basic information, including applicable law, procedural rules, service of process, permission to practice, court staff, hours of operation, and locations.
- Compile tribal laws and written judicial decisions in a central location accessible to attorneys and litigants of each state and offer these materials for publication on computer legal research networks.
- Obtain state/tribal intergovernmental agreements on matters of concern from within the state and from other states for use as models for new agreements.
- Develop procedures to contact counterparts in tribal judiciaries by telephone to answer questions or resolve problems.

Understanding and respect

Effective state and tribal court communication and cooperation is achievable. Although mutual respect, understanding, and cooperation cannot be legislated, much can be accomplished by person-to-person communication and sharing information among tribal and state judges and court staff. Furthermore, this kind of ongoing dialogue among state and tribal courts appears to be a prerequisite to effective formalization of relationships.

The American Bar Association's Center on Children and Law asked state and tribal leaders about the most significant barriers to smooth interjurisdictional relations:

Invariably they cited a lack of understanding and respect as one of the most prevalent impediments to the successful development of agreements or to the effective implementation of many agreements that have been produced. It was reported that talks and/or agreements between neighboring state and tribal governments frequently fail because there had been inattention to the history, cultural considerations, and important political or fiscal realities that form an ever-present context for tribal/state co-existence. [\[FN7\]](#)

If effective personal relationships are established, then legislation, court rules, and intergovernmental agreements can be developed and used to formalize routine relationships for the greatest benefit of everyone. [\[FN8\]](#)

We are a community of peoples and have come a long way toward becoming a community of courts. Our great diversity is part of what makes America unique. Our ability to both preserve and recognize different peoples, cultures, and traditions is the key element in preventing balkanization of our country. The resolution of tribal, state, and federal jurisdictional disputes is a necessary step in the process of preserving our diverse cultures on the one hand, and national unity on the other.

[\[FNa\]](#) Stanley G. Feldman is chief justice of the Arizona Supreme Court.

[\[FNb\]](#) David L. Withey is general counsel, Administrative Office of the Courts, Arizona Supreme Court.

[\[FN1\]](#). [Tracy v. Superior Court, 168 Ariz. 23, 32, 810 P.2d 1030, 1039 \(1991\).](#)

[\[FN2\]](#). [Cherokee Nation v. Georgia, 30 U.S. \(5 Pet.\) 1 \(1831\); Worcester v. Georgia, 31 U.S. \(6 Pet.\) 515 \(1832\).](#)

[\[FN3\]](#). Rubin, Tribal Courts and State Courts: Disputed Civil Jurisdiction Concerns and Steps Toward Resolution, State Court J., Spring 1990, at 9.

[\[FN4\]](#). Conference of Chief Justices, Resolution XIV, adopted August 3, 1995.

[\[FN5\]](#). Navajos Think Anglo Legal Order No Better, Maricopa Lawyer, Sept. 1989, at 16.

[\[FN6\]](#). Id.

[\[FN7\]](#). Mickens, Toward a Common Goal: Tribal and State Intergovernmental Agreements for Child Support Cases, ABA Center on Children and the Law 7 (1994).

[\[FN8\]](#). The model legislation, court rules, and intergovernmental agreements developed or compiled by forum states can be obtained through the National Center for State Courts, 300 Newport Avenue, Williamsburg, Virginia 23187-8798. Included in the proposed tribal courts project is establishment of a national clearinghouse containing these materials so they are more readily available.